Supreme Court, U.S.
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No. 02-600

In The

Supreme Court of the United States

JOSE ELIGIO BORGES,

Petitioner,

-vs-

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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PETITIONER

53 pp

QUESTIONS PRESENTED

I. Whether former trial counsel's conduct, advice to petitioner and his co-defendants and constant reference to trial judge and jury that he was the defense team constituted "multiple representation" under *Cuyler v. Sullivan*, 466 U.S. 335 (1980) as well as a conflict of interest?

II. Whether the trial judge, after being informed by the prosecutor of a conflict of interest of petitioner's former trial counsel stemming from multiple representation, failed to meet the strictures of Federal Rule of Criminal Procedure 44(c) and conduct a searching inquiry by simply asking one question of petitioner and his co-defendants: "do you have a problem?"

III. Whether petitioner demonstrated that his defense attorney had an actual conflict of interest, and that his conflict adversely affected the attorney's performance, warranting habeas relief under *Cuyler*, *supra*, and *Mickens v. Taylor*, ___ U.S. ___, 122 S. Ct. 1237 (2002)?

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PETITION FOR WRIT OF CERTIORARI

Jose Eligio Borges (Mr. Borges) respectfully prays for a writ of certiorari to review and reverse the judgment of the United States Court of Appeals for the Eleventh Circuit entered in the above referenced matter on March 15, 2002.

OPINIONS BELOW

The unpublished opinion of the Eleventh Circuit of Appeals is reproduced in the Appendix hereto "A." Also appended is the order denying the petition for rehearing and suggestion for rehearing *en banc* dated May 15, 2002, (Appendix "C") and the District Court's order denying the section 2255 habeas corpus petition, (Appendix "B"), in *Borges v. United States*, No. 00-00745-cv-CC-1 & No. 91-00279-CR-1 (S.D. Fla.).

JURISDICTION

This Court's jurisdiction is invoked pursuant to Title 28 U.S.C. § 1254(1). Mr. Borges' petition seeks to vacate his conviction based on a Sixth Amendment violation. This petition presents this Court with a serious constitutional question as well as a conflict between the Federal Circuit Court of Appeals and this Court's most recent decision in *Mickens v. Taylor*, 122 S. Ct. 1237 (2002) that materially effects a determination made in the present case. The Constitutional questions and conflicts arise over whether a trial judge, after being informed of a conflict of interest regarding a defense attorney, must conduct a colloquy for a defendant to effectively waive his right to conflict-free

counsel as well as meet core constitutional requirements where counsel's conflict adversely affected Petitioner.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of Title 28 U.S.C. § 2255 and the Sixth Amendment to the U.S. Constitution are set forth in the Appendix (App. "D" and "E"), respectfully.

STATEMENT OF THE CASE

A. Procedural History.

In August 1991, a federal grand jury for the Northern District of Georgia – ATLANTA DIVISION indicted JOSE ELIGIO BORGES (Mr. Borges), his brother GERALDO BORGES and WILSON VELEZ for violation of Title 21, United States Code, Section 846 (conspiring to possess with intent to distribute cocaine). The indictment consisted of just one count and did not charge the quantities of drugs other than a detectable amount.

On June 3, 1992, Mr. Borges, his brother and Mr. Velez were convicted of the drug trafficking charge by a jury. On February 20, 1998, the District Court sentenced Mr. Borges to a term of 360-months imprisonment and a period of five years supervised release.

On July 14, 1999, the Eleventh Circuit Court of Appeals affirmed Mr. Borges' conviction and sentence. In March 2000, Mr. Borges filed his first collateral attack against his conviction and sentence pursuant to Title 28 U.S.C. § 2255 (Amended). The district court below denied

the habeas petition on the merits. The Eleventh Circuit Court of Appeals affirmed the denial of the section 2255 petition on March 15, 2002, and denied Mr. Borges petition for rehearing and suggestion for rehearing *en banc* on May 15, 2002.

Mr. Borges is currently serving his federal sentence at a federal correctional institution known as FCC-Coleman (LOW), Coleman, Florida. The Custodian is P. LAIRD, Warden.

B. Facts.

Following the announcement of the criminal indictment in the case *sub judice*, and subsequent arrests of Mr. Borges, his brother Geraldo Borges and Wilson Velez, Attorney STEPHEN ROSEN made an appearance for all defendants at their initial bond hearing in the Southern District of Florida. Thereafter, Attorney Rosen filed a *Pro Hac Vice* application to represent Mr. Borges in the Northern District of Georgia. Attorney PAUL MORRIS, who also practiced in South Florida, filed his *Pro Hac Vice* application in the district court in Atlanta, claiming to represent Wilson Velez. Attorney FRANK J. PETRELLA became the local counsel for both defendants, Mr. Borges and Mr. Velez. Attorney Patrella filed a separate appearance for defendant Geraldo Borges.

Attorney Rosen adopted all of the pre-trial motions of co-defendant Wilson Velez, filing no pre-trial motions other than a motion for a continuance (of trial). R1-37.

During the pre-trial stages, Attorney Rosen met with both defendants, Mr. Borges and Mr. Velez, separately, explaining that they could not entertain any type of plea

negotiations opining that if one was to plead guilty, it would cause enormous injury to the other if a trial by jury was held. In the absence of any advice relative to plea-bargaining, the case proceeded to trial.

At trial, the Government presented its informant, MIGUEL COLUMNA, the only percipient witness in the instant case. R14-112. Mr. Columna told the jury that after his arrest, he began cooperating with the Government. He was debriefed by the law enforcement officers, where, during the interview, Mr. Columna did not implicate Mr. Borges in the drug conspiracy. R8-31. However, later on he claimed Mr. Borges had sent him to Chicago to take possession of 20 kilograms of cocaine, R7-82; Mr. Borges' brother, Geraldo met him (Columna) in Chicago to locate the cocaine and take possession of same. R7-87. Mr. Columna spoke with Mr. Velez once or twice by telephone while he was in Chicago, but he could not be sure whether he saw Mr. Velez in Chicago. R7-83. Mr. Columna rented a moving truck, met with Geraldo Borges, where they drove to a house, loaded the truck with approximately 100 kilograms of cocaine and began traveling to Atlanta, Georgia to make the delivery of the controlled substance. R7-91. Geraldo Borges, driving in another vehicle, showed Mr. Columna the way out of Chicago and onto the interstate, heading towards Atlanta. Columna sold the cocaine to various clients in Atlanta for prices varying from $22,000 to $29,000 per kilogram. R8-6. Mr. Columna saw Mr. Borges on several occasions, mainly to deliver money to him in order to pay down the cocaine debt of $1,900,000 (the value of cocaine he picked up in Chicago). Mr. Columna's wife was to have delivered money to Mr. Borges on two occasions. R8-8. Phone records from the Hotel in Chicago where Mr. Columna stayed showed calls to Mr.

Borges' mini-store in Miami, Florida and Mr. Columna's residence in Smyrna, Georgia. R13-36, 28. Mr. Columna also told the jury that "[he] forgot a lot about this incident." R9-122.

Of importance, Mr. Columna, after deciding to cooperate with the Government, contacted Mr. Borges while their conversations were being monitored by the Government agents. R8-17. During the recorded conversations, Mr. Borges was asked if he would involve himself in the drug conspiracy. Mr. Borges responded that he had "hung up his gloves." R14-51.

During the course of the trial, the prosecutor opined that there was a conflict issue regarding the Defense lawyers. Specifically, the prosecutor made the following statements to the trial judge:

> We probably ought to clear up on the record particularly since the defense seems to be acting as a team . . . . is Mr. Patrella acting as local counsel for Jose Borges and Wilson Velez . . . . Counsel had assured both myself and the Magistrate that this was not a problem, but since we have gone on to the record about a defense team, I think we should make it clear and the court should inform the Defendants, and make sure they understand and that there isn't a conflict or that they have waived it.

R13-48-49.

Mr. Borges' trial counsel, Counsel Rosen, immediately attempted to stonewall any inquiry. Counsel Rosen told the trial judge:

> "Judge, I can say there is no conflict."

After the prosecutor expressed further concerns indicating the parties had agreed to raise the issue with Judge Hall, Counsel Rosen again adamantly stressed there had not been and was not now a conflict. R13-49. Counsel Rosen continued, "They all have their own lawyers. There's been no conflicts, there's been no cross-over or anything like that." R13-50.

The trial judge responded to conflict issue by merely asking each of the defendants: "Do you have a problem?"

Each of the defendants answered "no," or "no sir." The trial judge made no further inquiry nor did he ask Counsel Rosen if the defendants were acting as a team or whether the defendants understood the perils of a conflict. R13-51.

The trial was later concluded whereat the jury returned a guilty as to each defendant. Prior to sentencing, Mr. Borges was advised by Counsel Rosen to not only flee, but encouraged him to do so. Wasting no time, Mr. Borges became a fugitive. He was later apprehended and sentenced several months later to a lengthy prison term – 360 months.

While serving his federal sentence, Mr. Borges' wife informed him that Counsel Rosen had tried to become intimate with her during the course of the trial.

On direct appeal, Mr. Borges raised a claim of conflict of interest regarding former trial Counsel Rosen. The Eleventh Circuit declined to reach the issue, citing the issue was more appropriate for a section 2255 proceeding where the record could be more fully developed.

Thereafter, Mr. Borges filed his motion to vacate his conviction and sentence pursuant to 28 U.S.C. § 2255, claiming among other things, that his counsel rendered

ineffective assistance during the plea and trial stages in the case *sub judice*. Mr. Borges specifically contended his counsel labored over a conflict of interest for several reasons: 1) critical impeaching evidence against Mr. Columna, the Government's only accuser at trial was not utilized because Rosen represented the interests of Geraldo Borges and because Counsel Rosen selected counsel for Geraldo Borges and co-defendant Velez; 2) Counsel Rosen had desired and pursued an intimate relationship with Mr. Borges' wife during the course of the criminal proceedings; and 3) Counsel Rosen instructed Mr. Borges to flee the country before being jailed for life.

In support of his habeas claim of conflict of interest regarding his former trial counsel, Mr. Borges produced the following evidence: 1) An affidavit of Wilfredo Santiago, Counsel Rosen's criminal investigator who attested that Counsel Rosen always stated and held himself out as representing both Mr. Borges and Mr. Velez; Mr. Santiago was present with Counsel Rosen when Counsel Rosen discussed the cases in the presence of Mr. Borges and Mr. Velez; Counsel Rosen often discussed the common strategy of the co-defendants cases with both defendants, Mr. Borges and Mr. Velez; and Counsel Rosen never discussed plea negotiations with Mr. Borges or Mr. Velez. R2-99-20; R.EX. 41; 2) Affidavit of Jonnie Damiano which showed that he (Damiano) had accompanied Mr. Velez to Counsel Rosen's law office prior to and in preparation of the criminal trial; Mr. Velez had always referred to Counsel Rosen as his (Velez's) lawyer; Mr. Velez paid the fee for representation to Counsel Rosen. R2-99-20; R.EX. 52; 3) Affidavit of Wilson Velez which accurately stated that Counsel Rosen was paid with a cashier's check in the amount of $5,000.00; Mr. Velez openly discussed his case with Counsel Rosen in

the presence of Investigator Santiago and Mr. Borges; Mr. Velez never paid Counsel Morris any money and considered him (Morris) to be an assistant to Counsel Rosen. R2-99-25; R.EX. 46; Mr. Velez was never told of any plea opportunities or discussions nor alternatives to the trial; 4) Affidavit of Luz Borges, Mr. Borges' wife which articulated Counsel Rosen's inappropriate and persistent conduct in attempting to become intimate with her during the course of the criminal proceedings; 5) Affidavit of Mr. Velez's sister, Nilsa Velez who stated that her brother always referred to his lawyer as Counsel Rosen.

The habeas court, in the absence of an evidentiary hearing on the conflict of interest issue, entered an order denying the section 2255 petition and relief requested therein. Following the issuance of a certificate of appealability, the Eleventh Circuit affirmed the habeas court's judgment denying the section 2255 habeas petition. The instant case is now timely and properly before this Court for review.

REASONS FOR GRANTING THE PETITION

The Court should grant the writ of certiorari because the questions raised by this case involve serious constitutional questions as well as a conflict among the circuit court of appeals and this Court.

The Eleventh Circuit Court of Appeals decided against Mr. Borges on the issue of whether his former trial counsel "was laboring under a conflict of interest that prejudiced his case [.]" *Appendix A.* The Eleventh Circuit reasoned since the trial judge had conducted an inquiry into whether a conflict of interest existed and each of the

defense attorneys represented to the trial judge that no conflict existed as well as the district court confirming with each of the defendants that there was no problem with their representation prior to proceeding with the trial, any belated claim to the contrary was waived. Notwithstanding such conclusion, the Eleventh Circuit opined:

> "[Mr.] Borges failed to satisfy the first prong of *Cuyler [v. Sullivan*, 466 U.S. 335, 100 S. Ct. 1708 (1980)], that is, to show that his defense attorney had an actual conflict of interest."

Opinion at Appx. A.

The Eleventh Circuit concluded that it "was satisfied that [Mr.] Borges' individual interests . . . were adequately protected . . . . throughout the trial." *Id.*

The Sixth Amendment right to counsel, "is the right to the *effective assistance* of counsel." *Strickland v. Washington*, 466 U.S. 668, 686, 104, S. Ct. 2052 (*quoting McMann v. Richardson*, 397 U.S. 759, 771, n.14, 90 S. Ct. 1441 (1970)). The right is driven by the rationale that the effective assistance of counsel is necessary to safeguard the right to a fair trial: "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." *United States v. Cronic*, 466 U.S. 648, 654, n.8, 104 S. Ct. 2039 (1984) (*quoting Powell v. Alabama*, 287 U.S. 45, 68-69, 53 S. Ct. 55 (1932)); *see also Kimmelman v. Morrison*, 477 U.S. 365, 377, 106 S. Ct. 2574 (1986) (" 'Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have.' ") (*quoting* Walter V. Schaefer, *Federalism & State Criminal Procedure*, 70 HARV. L. REV. 1, 8 (1956)).

The premise of an adversarial system in which the defendant has an effective advocate for his side "underlies and gives meaning to the Sixth Amendment. It is meant to ensure fairness in the adversary criminal process. Unless the accused receives effective assistance of counsel, a serious risk of injustice infects the trial itself." *Cronic*, 466 U.S. at 655-56, 104 S. Ct. 2039 (footnotes, internal quotations and citations omitted). Effective assistance also requires that an attorney adhere to his duty of undivided loyalty to his client. *Strickland*, 466 U.S. at 692, 104 S. Ct. 2052.

In *Strickland*, this Court laid out the now familiar yardstick by which the effectiveness of counsel should be measured: a two prong test whereby a defendant claiming ineffective assistance of counsel must demonstrate (1) that the defense attorney's representation "fell below an objective standard of reasonableness," and (2) the attorney's deficient performance prejudiced the defendant such that "there is a reasonable probability that, but for counsel's unprofessional errors, that result of the proceeding would have been different." *Stickland*, 466 U.S. at 688, 694, 104 S. Ct. 2052.

However, "[i]n two cases prior to *Strickland*, [ ], th[is] Court held that the burden may be lighter for defendants who assert ineffective assistance of counsel because of a conflict of interest involving their attorney." *Caban v. United States*, 281 F.3d 778, 781 (8th Cir. 2002). *Halloway v. Arkansas*, 435 U.S. 475, 98 S. Ct. 1173 (1978), "addressed situations where the trial court is made aware of a potential conflict of interest before, during, or in some instances, after trial. Under those circumstances, the Court held the trial court has a duty to conduct a searching inquiry into the possibility of a constitutional violation

arising from that conflict." *Caban*, at 781 (*citing Wood v. Georgia*, 450 U.S. 261, 272 n.18, 101 S. Ct. 1097 (1981) (noting that *Cuyler* "mandates a reversal when the trial court has failed to make an inquiry even though it 'knows or reasonably should know that a particular conflict exists' "). "When a trial court fails to discharge its constitutional duty to determine whether the defendant is receiving assistance of counsel unburdened by a conflict of interest, prejudice is presumed and reversal of the conviction is automatic." *Atley v. Ault*, 191 F.3d 865, 873 (8th Cir. 1999) (*citing Halloway, supra.*) This Court has never applied this per se rule of presumed prejudice outside the context of multiple representation of codefendants or serial defendants. *See, e.g., Nix v. Whiteside*, 475 U.S. 157, 176, 106 S. Ct. 988 (1986); *see also Beets v. Scott*, 65 F.3d 1258, 1268 (5th Cir. 1995) ("*Cuyler*, a multiple representation case, restated a rule developed in multiple representation cases.").

"Where the same attorney or associated attorneys represent co-defendants, the Federal Rules of Criminal Procedure require that the court inquire in advance into such representation and advise each defendant of the right to the effective assistance of counsel, including the right to separate representation[.]" *United States v. Ramierez-Benitez*, 292 F.3d 22, 29 (1st Cir. 2002) (*citing* Fed.R. Crim.P. 44(c); *Mickens v. Taylor*, ___ U.S. ___, 122 S. Ct. 1237, 1241-42 (2002)).

Rule 44(c) of the Federal Rules of Criminal Procedure plainly requires a searching inquiry when two or more defendants "are represented . . . by retained or assigned counsel who are associated in the practice of law." Fed.R.Crim.P. 44(c). "Representations of co-indictees by members of the same law firm may create a conflict of

interest similar to that when a single attorney represents two or more co-defendants." *Ramirez-Benitez*, at 29 (*citing Burger v. Kemp*, 483 U.S. 776, 783, 107 S. Ct. 3114 (1986)) (assuming without deciding that two law partners are considered as one attorney).

Some twelve days following the Eleventh Circuit's rendering its judgment in the case *sub judice*, this Court decided *Mickens*, which held:

> In order to demonstrate a Sixth Amendment violation where the trial court fails to inquire into a potential conflict of interest about which he knew or reasonably should have known, a defendant must establish that a conflict adversely affected his counsel's performance.

Mickens, 122 S. Ct. at 1243-44.

The Trial Judge Failed to Meet Rule 44(c) Core Requirements.

As the record plainly shows, the trial judge was alerted to the actual conflict of interest with respect to Mr. Borges' former trial attorney, Counsel Rosen. The prosecutor quite clearly put the court on notice of the need to conduct a searching inquiry. Instead of meeting the strictures of this important rule of criminal procedure, the trial judge simply deferred to Counsel Rosen that no conflict existed. There was no searching inquiry as mandated by the rule nor was there any valid waiver of the conflict by the defendants. The trial judge propounded only one question to the defendants – "Do you have a problem?" Mr. Borges submits such an exercise not only falls well below the minimum inquiry standard, but fails in every aspect in meeting constitutional muster. *See United States v.*

Cherry, 211 F.3d 575, 578 (10th Cir. 2000) ("There is a presumption against waiver of constitutional rights, and for a waiver to be effective it must clearly establish that there was an intentional relinquishment or abandonment of a known right or privilege.") (*Quoting Brookhart v. Janis*, 384 U.S. 1, 4, 86 S.Ct 1245 (1996)); *see also McCarthy v. United States*, 394 U.S. 459, 466, 89 S. Ct. 1166 (1969); *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 1023 (1938); *Wainwright v. Sykes*, 433 U.S. 72, 92, 97 S. Ct. 2497, 2509 (1977) (Burger, C.J., concurring); *Fay v. Nola*, 372 U.S 391, 439, 83 S. Ct. 822, 849 (1963). "The question of an effective waiver of a federal constitutional right in a proceeding is of course governed by federal standards." *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct 1709 (1969) (*citing Douglas v. Alabama*, 380 U.S. 415, 422, 85 S. Ct. 1074 (1965)).

Given this alleged conflict of interest arises from Counsel Rosen's loyalty to Mr. Borges and his co-defendant, Mr. Velez, it appears that all is needed to be shown here is that there was an actual conflict; that is, prejudice will be presumed. *See Halloway*, 435 U.S. at 490, 98 S. Ct. at 1182 (recognized that the prejudice flowing from a conflict of interest is immeasurable because one component "is what the advocate finds himself compelled to refrain from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process.").

The appellate court below concluded that the trial record "amply support[ed] the district court's finding that the defendants were not represented by the same attorney . . . [Attorneys] Petrella, Rosen, and Morris made their own closing arguments, cross-examined witnesses separately and called their own witnesses in support of their

different theories." *Appx. A.* The appellate court opined that by Counsel Rosen meeting with Mr. Borges and Mr. Velez "together at times" was insignificant and did not bear on the issue of multiple representation and conflict of interest flowing there from. Id.

Mr. Borges submits that the appellate court's aforementioned conclusion cannot be reconciled with the trial record, the habeas affidavits and record below. Each of the affidavits demonstrate that Counsel Rosen not only received all the monies for the legal fees from Mr. Borges and Mr. Velez, but local counsel, Mr. Perella and Counsel Morris were selected by and worked under Counsel Rosen. It appears difficult to imagine that this type of arrangement and "team" effort, considering the totality of the circumstances, would not satisfy the first prong of *Cuyler*. Mr. Borges respectfully submits that the court below was simply wrong and missed the constitutional mark.

Although the court below did not reach the second prong of *Cuyler*, it is evident that further discussion is warranted here.

Counsel Rosen could have pursued a plausible alternative strategy.

The informant, Mr. Columna, was a weak witness as one could imagine. Besides the obvious co-conspirator and informant impeachment, Mr. Columna conceded that his memory was subsequently impaired by his drug use, he often committed perjury to gain a benefit, he initially omitted Mr. Borges' involvement in DEA debriefings and was incorrect regarding details of Mr. Borges' involvement.

The prosecutor admitted the weakness of her case against Mr. Borges. Nonetheless, each defendant had a separate ball and chain to carry throughout the trial. Mr. Velez tried to convince the jury he was nowhere around when the drug conspiracy took place. Mr. Borges was burdened with the monitored tape recording, in which he stated that he would not involve himself with a future drug deal with Mr. Columna because he had "hung up his gloves." As thin as the prosecutor conceded this case to be, it was substantially more difficult for both defendants to be acquitted if the jury held each responsible for the taped conversation *and* the connection to the informant. Thus, it was incumbent upon Counsel Rosen to limit Mr. Borges connection to the informant and his co-defendant Mr. Velez. Counsel Rosen could have attempted this by any of the following: 1) A severance, on a theory that Mr. Columna admitted that Mr. Borges asked him to pick up 20 kilograms of cocaine and co-defendant Velez ordered him to take the balance of what a third party did not take. Thus, he could have argued that there were two separate conspiracies with Mr. Velez as the prime mover of the latter one; 2) Based on the same theory, Counsel Rosen could have asked for a limiting instruction, that the Curtis Culvin evidence should be admitted against Mr. Velez and Geraldo Borges only; 3) Counsel Rosen could have put as much distance between Mr. Borges and the Government witness, Curtis Calvin, as possible.

However, with Counsel Rosen *actively* representing both defendants by objecting to evidence that was being received against Mr. Velez, by announcing to the jury that the defense team needs a meeting, by announcing that the **defense team** will offer evidence, and by representing both at the bond hearing, it is not surprising that Counsel

Rosen did not take any position at trial that would indicate he was not actively and passionately representing co-defendant Velez.

Rather than zealously fighting for a severance, limiting instructions or distancing tactics from the government witness, the jury learned that Counsel Rosen actually arranged for the government witness, Curtis Calvin to be a witness for Mr. Velez. The active representation of both defendants created a severe detriment to Mr. Borges' chances of prevailing in his case. For example, the government witness Calvin, arranged for by Counsel Rosen on behalf of Mr. Velez, testified that he not only knew Mr. Borges very well, but had sold an Infinity automobile to the family for $28,000.00. Mr. Calvin further testified that he was a friend of Mr. Borges and that they "talked a lot."

The collective wisdom of juries is not to be denied. It would be fairly evident to each juror and very difficult for the panel to miss that Mr. Borges spoke no English, that these two dissimilar men would hardly be social friends and because Mr. Borges spoke no English – literally could not "talk a lot." Counsel Rosen, by arranging for this testimony in an attempt to assist his other client, Mr. Velez, put one huge nail in Mr. Borges' coffin.

Furthermore, when Mr. Calvin admitted that it was Mr. Borges' attorney that made the arrangements for him to testify, even though he was technically called as a witness by Mr. Velez, the jury immediately concluded that Mr. Borges and Mr. Velez were involved together. These two defendants were the "team" that Counsel Rosen was subjecting Mr. Borges to, all of the prosecution's evidence that corroborated Mr. Columna when he testified that Mr.

Calvin was involved in this conspiracy. That was the second nail!

A careful review of the prosecutor's closing statements to the jury reveals the Government made substantial use of Mr. Calvin's testimony. The damaging testimony, in total, was, in estimation of the prosecutor, the final nail in Mr. Borges' coffin.

It is clear that Counsel Rosen made "a choice between plausible courses of action, such as presenting arguments or, evidence helpful (so he thought) to one client but harmful to another." *United States v. Mers*, 701 F.2d 1321 1329 (11th Cir. 1983). When two defendants must distance themselves from evidence, which is primarily being separately introduced against each one and one lawyer cannot move to sever, limit evidence to one, or create a distance from both clients from the offending evidence, there is huge detriment to both defendants.

Whether a reasonably competent counsel, representing Mr. Borges, would have elected to shift the blame on the two co-defendants given the weak circumstantial evidence presented by the Government at trial, is certainly another plausible defense to consider under *Cuyler's* second prong. A conflict-free counsel representing Mr. Borges would have brought out during cross-examination not only that Geraldo Borges and Mr. Columna were good friends and criminal confidants and co-conspirators for many years, but also Mr. Columna had supplied the murder weapon to Geraldo Borges in a drug killing.

Nonetheless, what is so glaring is defending Mr. Borges in a case described by the prosecutor to the jury as "thin", was an attorney who took it upon himself to collect fees of three co-defendants and run the show. Unable to

keep all three balls in the air, Counsel Rosen produced evidence that worked against Mr. Borges and associated him with a co-defendant who suffered strong evidence of guilt. No effective cross-examination of another co-defendant could be commenced because showing the falsity of this co-defendant's defense and connecting him to the informant would have also been divisive to the "team."

Despite the urging of the prosecutor, there were no constitutional protections provided to Mr. Borges because Counsel Rosen blatantly misrepresented the relationship amongst counsel. Surely, Mr. Borges' answer "no" (especially during the heat and pressure of a jury trial), to the trial judge's question, "Do you have a problem?", cannot be construed as fulfilling the mandate of Rule 44(c) or a functional equivalent to a "searching inquiry" or an herbal tonic that cures a monolith of Constitutional infirmities.

CONCLUSION

WHEREFORE, Jose Eligio Borges, PETITIONER, requests nothing more than a new trial with counsel who has no divided loyalties and with evidence that is not distorted due to the egregious errors and conduct of counsel and the admitted perjury of a co-defendant. Based on the foregoing argument and law, Mr. Borges respectfully requests this Court to grant the instant petition; and enter an order granting same, vacating the judgment of the court below, and remanding the case with instructions consistent with this Court's judgment.

Oct. 16, 2002
Coleman, Florida

Respectfully submitted,

JOSE ELIGIO BORGES
FCC-Coleman (LOW)
P.O. Box 1031
Coleman, FL 33521-1031

PETITIONER

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 01-10812
Non-Argument Calender

D.C. Docket Nos. 00-00745-CV-CC-1 &
91-00279-CR-1-1

JOSE ELIGIO BORGES,
a.k.a. Papo,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court for the
Northern District of Georgia

(March 15, 2002)

Before EDMONDSON, BARKETT, and MARCUS,
Circuit Judges.

PER CURIAM:

Jose Eligio Borges, a federal prisoner convicted of conspiracy to possess with intent to distribute cocaine and sentenced to 360 months' imprisonment, appeals the district court's denial of his 28 U.S.C. § 2255 motion to vacate, set aside, or correct sentence. Borges argues in

essence that his attorney, Stephen Rosen, labored under a conflict of interest based on his alleged representation of both Borges and one of Borges's co-defendants, and that this conflict rendered Rosen's representation of Borges constitutionally ineffective.[1]

On appeal from the denial of a § 2255 motion to vacate, set aside or correct sentence, we review *de novo* a claim of ineffective assistance of counsel. *See Chandler v. United States*, 218 F.3d 1305, 1312 (11th Cir. 2000) (en banc). A district court's findings of fact in a habeas proceeding are reviewed for clear error. *See Byrd v. Hasty*, 142 F.3d 1395, 1396 (11th Cir. 1998).

Upon thorough review of the record, as well as careful consideration of the parties' briefs, we find no reversible error and affirm.

The facts relevant to Borges's ineffective-assistance-of-counsel argument are straightforward. Borges and two co-conspirators, Geraldo Borges and Wilson Velez, were indicted for conspiracy to possess with intent to distribute cocaine, in violation of 21 U.S.C. § 846. Borges, Geraldo Borges, and Velez proceeded to joint trial, at the end of which the jury convicted the defendants as charged in the indictment. At trial, Borges was represented by Stephen Rosen; Geraldo Borges was represented by Frank Petrella; and Velez was represented by Paul Morris. Borges was ultimately sentenced to a period of 360 months' imprisonment with a period of five years of supervised release afterwards.

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[1] We grant Borges's motion for leave to file his reply brief out of time.

On January 8, 1997, Richard A. Hamar filed a motion for admission *pro hac vice* and a motion to set aside Borges's conviction and to conduct a Rule 44(c) hearing" on whether counsel labored under a conflict of interest at Borges's trial. The district court denied the motion on February 19, 1998, finding that the motion for a Rule 44(c) hearing was untimely because Borges was currently represented by conflict-free counsel and noting that Borges would have to proceed with a § 2255 habeas petition to make this argument. Borges appealed his conviction to this Court, asserting, among other things, that his conviction should be reversed because his attorney had a conflict of interest at trial. In an unpublished opinion, we affirmed his conviction and sentence, specifically noting that Borges would have to raise the conflict-of-issue argument in the context of a § 2255 proceeding. *See United States v. Borges*, No. 98-8279 (11th Cir. July 14, 1999).

Thereafter, on April 4, 1996, Borges filed a motion to vacate his conviction and for dismissal, arguing that Rosen had represented him while laboring under a conflict of interest that prejudiced his case, primarily because Rosen allegedly represented co-defendant Velez as well as Borges, and because, among other things, Rosen failed to shift the blame to Borges's co-defendants and failed to negotiate a plea argument for Borges. In denying Borges's § 2255 petition, the district court specifically found that "[a] separate attorney represented each defendant: attorney Frank Petrella represented defendant Geraldo Borges; attorney Stephen Rosen represented defendant Wilson Velez."

This conclusion was based, in part, on the fact that, at trial, the district court had conducted an inquiry into whether a conflict of interest existed as a result of Frank

Petrella's role as local counsel for Borges, Geraldo Borges, and Velez. In response to the court's inquiry, each attorney represented to the district court that no conflict existed. The district court then confirmed with each of the defendants that there was not a problem with their representation prior to proceeding with the trial. The defendants all stated that they had no problem with the representation. Borges specifically indicated at that time that he did not have a problem with Rosen's representation.

Applying *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the magistrate judge determined that Borges and his co-defendants were, in fact, represented by separate counsel, and made the following conclusions of law with regard to Borges's ineffective-assistance-of-counsel claim:

"This claim parallels that made in co-defendant Wilson Velez's case. In that case, Velez claimed that although he was purportedly represented by Paul Morris, he was actually represented by Stephen Rosen, who had a conflict of interest[s] as he simultaneously represented Jose Borges. After an evidentiary hearing, this Court recommended denying co-defendant Velez's 28 U.S.C. § 2255 Motion to Vacate Sentence. In this Court's Report and Recommendation for Velez, this Court concluded that Velez was collaterally estopped from raising his claim of ineffective assistance due to an alleged conflict of interests arising from multiple representation.

In the instant case, Movant also seeks relief based on the other side of the same coin: an alleged conflict arising from alleged multiple representation by his attorney, Stephen Rosen. Specifically, the movant asserts that Stephen Rosen also represented his co-defendant, Wilson

Velez, which caused Rosen to have a conflict of interests – a divided loyalty [that] resulted in prejudice to the Movant's case. Furthermore, the Movant asserts that he did not adequately waive the alleged conflict. As a result, the Movant claims that the conflict prevented Rosen from shifting the blame off of the Movant to the co-defendant.

This Court also takes judicial notice . . . of [its] own court records and finds that the trial transcript . . . indicates that a separate attorney represented each defendant; and no such attorney also represented any co-defendant . . . .Thus, to echo this Court's conclusions in the Velez Report and Order, "[N]othing alerted the Court as to a possible conflict because defendants and their respective counsel had lied to it." *See* Fed. R. Crim. P. 44(c).

The magistrate judge then went on to observe that Borges "chose to lie to the Court and mislead it into believing that he was represented by his own attorney, and had no problems with his counsel's representation." The district court adopted the magistrate judge's Report and Recommendation and denied Borges's § 2255 petition. This appeal followed.

To establish ineffective assistance of counsel, the defendant must show that counsel's performance fell below constitutional standards and that his defense was prejudiced as a result. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d. 674 (1984). Ineffective assistance of counsel claims in the conflict of interest context are governed by the standard articulated by the Supreme Court in *Cuyler v. Sullivan*, 466 U.S. 335, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980). *See United States v. Novation*, 271 F.3d 968, 1010 (11th Cir. 2001). *Cuyler* establishes a two-part test that we use to evaluate

whether an attorney is constitutionally ineffective due to a conflict of interest. To show ineffectiveness under *Cuyler*, a petitioner must demonstrate: (a) that his defense attorney had an actual conflict of interest, and (b) that his conflict adversely affected the attorney's performance. *See Cuyler*, 466 U.S. at 348-49, 100 S. Ct. 1718.

To satisfy the "actual conflict" prong, a defendant must show something more than "a possible, speculative, or merely hypothetical conflict." *Lightbourne v. Dugger*, 829 F.2d 1012, 1023 (11th Cir. 1987). In *Smith v. White*, 815 F.2d 1401 (11th Cir. 1987), we developed a test that enables us to distinguish actual from potential conflicts of interest:

> We will not find an actual conflict of interest unless appellants can point to specific instances in the record to suggest an actual conflict or impairment of their interests . . . .Appellants must make a factual showing of inconsistent interests and must demonstratre that the attorney made a choice between possible alternative causes of action, such as eliciting (or failing to elicit) evidence helpful to one client but harmful to the other. If he did not make such a choice, the conflict remain(s) hypothetical.

Smith, 815 F.2d at 1404 (quotation marks and citation omitted). "[P]etitioner must be able to point to specific instances in the record which suggest an impairment or compromise of his interests for the benefit of another party." *Porter v. Singletary*, 14 F.3d 544, 560 (11th Cir. 1994).

Assuming a defendant can demonstrate that his attorney labored under an actual conflict of interest, the *Cuyler* test demands that he show that this conflict

adversely affected the representation he received. To prove adverse effect, a defendant needs to demonstrate: (1) that the defense attorney could have pursued a plausible alternative strategy; (2) that this alternative strategy was reasonable; and (3) that the alternative strategy was not followed because it conflicted with the attorney's external loyalties. *See Freund v. Butterworth*, 165 F.3d 839, 860 (11th Cir. 1999) (*en banc*).

Here, Borges failed to satisfy the first prong of *Cuyler*, that is, to show that his defense attorney had an actual conflict of interest. Quite simply, the record amply supports the district court's finding that the defendants were not represented by the same attorney. A review of the various pleadings and fillings made in this case clearly shows that, as the district court found, Petrella represented Geraldo Borges, Rosen represented Borges, and Morris represented Velez. In addition to filing their own pleadings and motions, Petrella, Rosen, and Morris made their own closing arguments, cross-examined witnesses separately and called their own witnesses in support of their different theories of defense. The fact that Rosen may have met with Borges and Velez together at times, or that Rosen may have discussed common trial strategies with Borges and Velez, does not change this conclusion since we are not satisfied that Borges's individual interests, as distinguished from his co-defendants had their own counsel present throughout the trial.

Quite simply, on this record, the district court did not err by finding that Borges failed to satisfy the first prong of *Cuyler* because he did not establish that an actual

conflict existed.[2] Accordingly, the district court did not err by denying Borges's habeas application based on ineffective assistance of counsel.

AFFIRMED.

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[2] Borges's argument that the district court should have made a further inquiry into the possibility that there was a conflict fails because the court had no reason to believe that an actual conflict existed. *See United States v. Benavidez*, 664 F.2d 1255, 1258 (5th Cir. 1982). In light of our conclusion that the district court did not err in its analysis as to the first prong of *Cuyler*, we do not address the second prong of the *Cuyler* analysis.

United States Court Of Appeals
For the Eleventh Circuit

No. 01-10812

District Court Docket Nos.
00-00745-CV-CC-1 & 91-00279-CR-1-1

JOSE ELIGIO BORGES,
a.k.a. Papo,

Petitioner-Appellant,

Versus

UNITED STATES OF AMERICA

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered: March 15, 2002

For the Court: Thomas K. Kahn, Clerk

By: Eggleston, Nataki

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JOSE BORGES, Movant	:	HABEAS CORPUS 28 U.S.C. § 2255
v.	:	CRIMINAL ACTION No. 1:91-CR-279-01-CC
UNITED STATES OF AMERICA, Respondent.	:	

ORDER

Attached is the report and recommendation of the United States Magistrate Judge in this action in accordance with 28 U.S.C. § 636 (b) (1) and this Court's Civil Local Rule 72 or Criminal Local Rule 58. Let the same be filed and a copy, together with a copy of this Order, be served upon counsel for the parties.

Pursuant to 28 U.S.C. § 636 (b) (1), each party may file written objections, if any, to the report and recommendation within ten (10) days of service of this Order. Should objections be filed, they shall specify with particularity the alleged error or errors made (including reference by page number to the transcript if applicable) and shall be served upon the opposing party. The party filing objections will be responsible for obtaining and filing the transcript of any evidentiary hearing for review by the District Court. If no objections are filed, the report and recommendation may be adopted as the opinion and order of the District Court and any appellate review of factual findings will be limited to a plain error review *United*

States v. Slay, 714 F.2d 1093 (11th Cir. 1983), *cert. denied*, 464 U.S. 1050, 104 S. Ct. 729, 79 L. Ed. 2d 189 (1984).

The Clerk is directed to submit the report and recommendation with objections, if any, to the District Court after expiration of the above time period.

IT IS SO ORDERED, this ___ day of ___, 2002.

/s/ Joel M. Feldman
JOEL M. FELDMAN
UNITED STATES
MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JOSE BORGES, Movant	:	HABEAS CORPUS 28 U.S.C. § 2255
v.	:	CRIMINAL ACTION No. 1:91-CR-279-01-CC
UNITED STATES OF AMERICA, Respondent.	:	

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Presently pending before the Undersigned is the Movant's 28 U.S.C. § 2255 Motion to Vacate Sentence [Doc. 177] and the Government's Response [Doc. 180].

REPORT AND RECOMMENDATION

PART ONE HISTORY OF THE CASE

On August 2, 1991, the Grand Jury charged Jose Eligio Borges ("Movant") in the above one-count indictment with conspiracy to possess with the intent to distribute cocaine, in violation of 21 U.S.C. § 846 [Doc. 1]. On November 13, 1991, while represented by Stephen Rosen, the Movant entered his not guilty plea [Doc. 15], and in due course the court set the case for trial. Stephen Rosen represented the Movant at trial.

On June 3, 1992, the jury returned a verdict of guilty [Doc. 54]. The Movant failed to appear at his sentencing hearing on August 19, 1992, and the Court granted the Government's Motion to Order Movant's Bond Forfeited. *See* Docket Sheet for 8/19/92. On October 18, 1993, the

Movant was arrested on the bond forfeiture warrant. On April 1, 1996, although not yet sentenced, the Movant filed a motion to vacate conviction and for dismissal pursuant to Rule 47 of the Federal Rules of Criminal Procedure [Doc. 99], which Judge Clarence Cooper denied on July 12, 1996 [Doc. 104]. On January 27, 1997, Movant filed a motion to vacate sentence pursuant to 28 U.S.C. § 2255 and conduct Rule 44(c) hearing [Doc. 107].[1] Judge Cooper referred the case to the undersigned Magistrate Judge, Joel M. Feldman. This Court's Report and Recommendation of October 30, 1997, recommended denying as premature Movant's motion to vacate sentence pursuant to 28 U.S.C § 2255 and denying motion to conduct Rule 44(c) hearing [Doc. 125].

On November 10, 1997, Movant filed a Motion for New Trial [Doc. 128], which Judge Cooper dismissed for lack of jurisdiction [Doc. 138]. As previously noted, on February 19, 1998, Judge Cooper adopted this Court's Report and Recommendation [Doc. 139]. The next day, on February 20, 1998, Judge Cooper sentenced the Movant to 360 months imprisonment [Doc 142]. Represented by Richard Hamar, the Movant appealed his conviction and sentence to the Eleventh Circuit Court of Appeals. On July 14, 1999, the Court of Appeals affirmed the judgment of the United States District Court for the Northern District of Georgia. [Doc. 169, *United States v. Borges*, No. 98-8279 (11th Cir. Aug. 17, 1999) (unpublished)].[1]

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[1] As the Movant was not sentenced until February 20, 1998 [Doc. 142], the Motion to Vacate Sentence was premature. *See* this Court's Report and Recommendation of 10/30/97 [Doc. 125], adopted as the District Court's Order [Doc. 139].

Movant, via attorney Richard Hamar, then filed the instant Motion to Vacate with request for an evidentiary hearing, contending that:

1. His attorney, Stephen Rosen, did not provide effective assistance of trial counsel, to wit:

    a. petitioner's counsel also represented co-defendant Wilson Velez – and this divided loyalty caused the admission of evidence that was prejudicial to Movant and caused prejudicial guilt by association (Ground A);

    b. using one attorney to represent all three defendants at trial without a knowing and intelligent *Garcia* waiver caused Movant to lose the benefit of placing the blame on a co-defendant who ended up testifying against him at sentencing (Ground B);

    c. Movant's counsel failed to negotiate a plea offer or communicate the offer (Ground C);

    d. Movant's counsel's performance at trial fell below the *Strickland* standard, because he failed to object to the misconduct by the prosecutor, failed to file one motion in the case, and failed to produce favorable evidence or testimony (Ground D);

    e. Movant's counsel attempted to seduce Movant's wife, causing tension, a loss of focus and a decrease in motivation to assist the Movant (Ground E).

[Doc. 177]. The Government filed a response [Doc. 180] as well as several exhibits.[2]

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[2] The Government has filed several exhibits, including:

1. a copy of the Docket Sheet as of May 18, 2000 (GX-A);
2. a copy of the Docket Sheet prepared for defendant's direct appeal (GX-B);
3. the Movant's Appellant Brief filed in his direct Appeal (Case Number 98-8279) (GX-C);
4. the Government's Brief filed on direct appeal (GX-D);
5. a copy of the Eleventh Circuit's unpublished opinion affirming Movant's conviction and sentence (GX-E);
6. the judgment/mandate of the Appellate Court (GX-F);
7. documents relating to co-defendant Wilson Velez's appearance in the Southern District of Florida in this case (GX-G);
8. documents relating to Movant's appearance in the Southern District of Florida in this case (GX-H);
9. co-defendant Velez's motion for continuance (GX-I);
10. the Movant's motion for continuance (GX-J);
11. a copy of the transcript of the May 19, 1992, pre-trial conference (GX-K);
12. a May 19, 1992, letter from Mary Jane Stewart, AUSA, to Stephen Rosen regarding the testimony of witness Columna (GX-L);
13. a May 19, 1992, letter from Paul Morris to Mary Jane Stewart, AUSA, listing a witness (GX-M);
14. a July 28, 1992, letter from Paul Morris to the Honorable William L. Harper, United States Magistrate Judge for the Northern District of Georgia, regarding an alleged bond violation (GX-N)
15. Velez's Motion for Leave to File Opening Brief of Appellant Out of Time in the Eleventh Circuit (GX-O);
16. Velez's Appellate Brief (GX-P);
17. the Eleventh Circuit opinion dismissing Velez's appeal (GX-Q);

(Continued on following page)

PART TWO THE ISSUE

1. WHETHER THE MOVANT RECEIVED EFFECTIVE ASSISTANCE OF TRIAL COUNSEL

PART THREE FINDINGS OF FACT

1. As its first Finding of Fact, the Undersigned adopts the foregoing History of the Case.

2. A separate attorney represented each defendant; attorney Frank Petrella represented defendant Geraldo Borges; attorney Stephen Rosen represented defendant Jose Borges; and attorney Paul Morris represented defendant Wilson Velez. (Trial Transcript ("Tr.V") vol. 5 at 48-51). *See also* GX-S.

3. When questioned by the Court, each defendant affirmed that he was represented by a separate attorney and had no problem with his attorney's representation. (Tr.V at 48-51).

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18. Velez's petition for a writ of certiorari from the United States Supreme Court to the Eleventh Circuit (GX-R);

19. a transcript of February 4, 1999, testimony of Paul Morris (GX-S) in the evidentiary hearing before the undersigned in connection with co-defendant Wilson Velez's 28 U.S.C. § 2255 Motion to Vacate Conviction based on ineffective assistance of trial counsel – trial counsel had a conflict of interest as said counsel was also representing a co-defendant, Jose Borges. *See* Tr. 44, 47-48;

20. Geraldo Borges's Appellate Brief (GX-T);

21. judgment and opinion affirming conviction and sentence of Geraldo Borges (GX-U);

22. A copy of the Docket Sheet prepared for Geraldo Borges's appeal (GX-V).

4. The record does not indicate that the government made a plea offer to Mr. Morris on behalf of Mr. Velez or to Mr. Rosen on behalf of the Movant.

5. The Movant has not shown that he was prejudiced by counsel's alleged failure to negotiate or communicate a plea offer.

6. The Movant has failed to describe the information he contends that his counsel would have provided by filing other unspecified motions, or how such other motions would have led to his acquittal.

7. The Movant has failed to describe the substance of the testimony his counsel could have elicited, or how such testimony would have led to his acquittal.

8. The Movant has failed to describe the evidence that his counsel could have provided, or how such evidence would have led to his acquittal.

9. The Movant has not shown that he was prejudiced by counsel's alleged sexual interest in Movant's wife.

PART FOUR CONCLUSIONS OF LAW

V. The Movant received the effective assistance of counsel

Movant's grounds do not accurately outline all of the arguments made in the memorandum of law section of his Petition. Nevertheless, all of Movant's arguments in the Petition raise a claim of ineffective assistance of trial counsel. In evaluating a claim of ineffective assistance of trial counsel, this Court must apply the two-part test enunciated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *See Esslinger v.*

Davis, 44 F.3d. 1515 (11th Cir., 1995); *Lancaster v. Newsome,* 880 F.2d 362 (11th Cir. 1989); *Gates v. Zant,* 863 F.2d. 1492 (11th Cir. 1989), *reh. denied* 880 F.2d 293 (1989), *cert. denied,* 493 U.S. 945, 110 S. Ct. 353, 107 L. Ed. 2d 340 (1989). Under the test, the Movant must first demonstrate that his counsel's performance was not reasonable "considering all the circumstances," and "under prevailing professional norms." The Court must be "highly deferential," and must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland,* 466 U.S. at 689.

A mere showing of counsel's ineffectiveness, however, does not entitle the applicant to relief. In order to meet the second part of the test, the Movant must also show that counsel's unreasonable acts or omissions prejudiced him. As such, the applicant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." 466 U.S. at 694.

A. <u>The alleged conflict of interests</u>

Grounds One and Two of Movant's Motion corresponded to his claim of ineffective assistance of counsel due to an alleged conflict of interests. This claim parallels that made in co-defendant Wilson Velez's case. In that case, Velez claimed that although he was purportedly represented by Paul Morris, he was actually represented by Stephen Rosen, who had a conflict of interests as he simultaneously represented Jose Borges. After an evidentiary hearing, this Court recommended denying

co-defendant Velez's 28 U.S.C. § 2255 Motion to Vacate Sentence. *See* GX-S. In this Court's Report and Recommendation for Velez, this Court concluded that Velez was collaterally estopped from raising his claim of ineffective assistance due to an alleged conflict of interests arising from multiple attorney representation.

In the instant case, Movant also seeks relief based on the other side of the same coin: an alleged conflict arising from alleged multiple representations by his attorney, Stephen Rosen. Specifically, the Movant asserts that Stephen Rosen also represented co-defendant, Wilson Velez, which caused Rosen to have a conflict of interests – a divided loyalty and resulted in prejudice to the Movant's case. Furthermore, the Movant asserts that he did not adequately waive the alleged conflict. As a result, the Movant claims that the conflict prevented Rosen from shifting blame off of the Movant to a co-defendant.

This Court also takes judicial notice, pursuant to Fed. R. Evid. 201, of this Court's own court records and finds that the Trial Transcript, Volume Five (June 1, 1992), indicates that a separate attorney represented any co-defendant (i.e. there was no conflict of interests.) Thus, to echo this Court's conclusions in the Velez Report and Recommendation and Order, "[N]othing alerted the Court as to a possible conflict because the defendants and their respective counsel had lied to it." *See* Fed. R. Crim. P. 44(c). "[W]hen a trial court has no reason to believe that a conflict exists, its failure to inquire concerning the propriety of joint representation or to advise a criminal defendant of his right to conflict-free representation is not in itself a denial of his constitutional rights." *United States v. Benavidez*, 664 F.2d 1255, 1258 (5th Cir.), *cert. denied,* 457 U.S. 1135, 102 S. Ct. 2936, 73 L. Ed. 2d 1334, and *cert.*

denied, 457 U.S. 1135, 102 S. Ct. 2963, 73 L. Ed. 2d 1352 (1982). Because the Movant chose to lie to the Court and mislead it into believing that he was represented by his own attorney, and had no problems with his counsel's representation, he will not now be heard to complain that Rosen, in fact, was laboring under a conflict of interests. In short, the Movant is collaterally estopped from now contending that he was denied the effective assistance of counsel because of an alleged conflict of interests. *See generally Ashe v. Swenson,* 397 U.S. 436, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970) (discussing the rule of collateral estoppel in criminal cases).

B. The alleged failure to negotiate or communicate a plea offer.

The Movant asserts that because of Rosen's multiple representation, Rosen failed to discuss "meaningful plea negotiations" with him. As previously determined, separate counsel represented each defendant. Therefore, the Movant is collaterally estopped from raising a claim of ineffective assistance of counsel based on a conflict of interests.

Furthermore, Movant has not sufficiently supported his allegations of an undisclosed plea offer. A Movant who, but for his attorney's deficient performance, would have pleaded guilty, is entitled to relief under 28 U.S.C. § 2255. *See Hill v. Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 370, 88 L. Ed. 2d 203 (1985); *Coulter v. Herring*, 60 F.3d 1499, 1504 (11th Cir. 1995), *cert. denied*, 516 U.S. 1122, 116 S. Ct. 934, 133 L. Ed. 2d 860 (1996); *Johnson v. Duckworth*, 793 F.2d 898, 900 (7th Cir. 1986), *cert. denied*, 479 U.S. 937, 107 S. Ct. 416, 93 L. Ed. 2d 367 (1986). In support of his claim, the Movant has submitted an

unsigned affidavit[3] stating, "He [Stephen Rosen] never told me that I could try to negotiate a plea, or that a plea was offered." [Doc. 107, Exhibit, Affidavit in Support of Rule 44(c) Motion by Defendant, Jose Borges, Para. 6]. Indeed, the records indicate that the Government never offered to enter into a plea bargain with either co-defendant. *See Zamora v. Dugger*, 834 F.2d 956, 960 (11th Cir 1987). Furthermore, the record is devoid of any indication that Movant actually desired or actively sought to enter into a negotiated plea bargain. As such, the Movant has not credibly shown that he would have accepted any plea offer; and, thus, he has not shown that he is entitled to relief on this claim. *See Coulter v. Herring*, 60 F.3d 1499, 1503-1504 (11th Cir. 1995).

The Movant's post-conviction assertion at this late date that he would have accepted a plea offer, standing alone, is "too little, too late," and is insufficient to "establish a reasonable probability that, absent counsel's alleged ineffective assistance, he would have accepted [any] plea agreement." *Diaz v. United States*, 930 F.2d 832, 835 (11th Cir. 1991); *see also Johnson v. Duckworth,* 793 F.2d at 902 n. 3. Consequently, the Undersigned concludes that the Movant has failed to show any requisite prejudice because of counsel's alleged failure to convey a plea offer.

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[3] The Movant labeled this affidavit, "Affidavit in Support of Rule 44(c) Motion by Defendant, Jose Borges." This affidavit is not signed or dated. A sticker affixed to the signature page of this affidavit reads, "To be sworn to in open court."

C. The alleged failure of Movant's counsel to object to misconduct by prosecutor at trial.

The Movant contends that his trial counsel was also ineffective in that he "failed to object to the prosecutor's misleading comment in closing, foreclosing a complete review on direct appeal." [Doc. 177 at 36]. The prosecutor had conceded that she would not use the Movant's prior narcotics convictions if the Movant did not testify. The prosecutor asserted to the jury in closing argument that the Movant's recorded statement, "I hung up my gloves," in response to a question of whether he would involve himself in a narcotics transaction, inculpated him in the instant offense.

The Movant contends that Rosen should have made an objection to the prosecutor's characterization of the statement because the Movant's prior convictions provide an exculpatory explanation. It is, however, clear that any such failure to object was a legitimate trial tactic; a strategic decision, which does not amount to ineffective assistance unless "it was so patently unreasonable that no competent attorney would have chosen it." *Kelly v. United States*, 820 F.2d 1173 (11th Cir.), *cert. denied*, 484 U.S. 966, 108 S. Ct. 458, 98 L. Ed. 2d 398 (1987) (quoting *Adams v. Wainwright*, 709 F.2d 1443, 1445 (11th Cir. 1983), *cert. denied*, 464 U.S. 1063, 104 S. Ct. 745, 79 L. Ed. 2d 203 (1984)). "A strong presumption exists that the challenged action constitutes sound trial strategy." *Chateloin v. Singletary*, 89 F.3d 749, 752 (11th Cir. 1996). Rosen's failure to object to the prosecutor's statement is consistent with his desire to prevent exposure of the Movant's prior criminal record to the jury. This same desire is apparent in Rosen's agreement not to have Movant testify, in exchange for the prosecutor's promise not to divulge the Movant's prior record. As such, the

Movant has not rebutted the presumption that Rosen's failure to object to the prosecutor's remarks constituted a legitimate trial tactic.

Assuming *arguendo* the Movant's attorney committed error by not objecting to the prosecutor's statement, the Movant has not shown that he was prejudiced thereby. The Movant's argument that "[t]his case may well have been reversed if Rosen had made this objection" fails to describe how Rosen's objection to the statement would have led to an acquittal. As such, the Movant has failed to satisfy the requisite prejudice prong of *Strickland*. [Doc. 177 at 39].

D. The alleged failure of Movant's counsel to file one motion in this case, and his failure to produce favorable evidence and testimony.

The Movant has only raised the foregoing contentions in the "grounds" section of his motion, stating, "petitioner's performance at trial fell below the *Strickland* standard, especially . . . his failure to file one motion in this case and his failure to produce favorable evidence or testimony." [Doc. 177 at 4]. However, the Movant failed to proffer any evidence in support of these bald conclusory contentions. As a result, he failed to satisfy either of the two *Strickland* prongs.

E. The alleged attempt by Movant's counsel to seduce Movant's wife, thus causing tension, loss of focus, and lessening of motivation to assist Movant.

The Movant relies on *United States v. Harris*, 846 F. Supp. 121 (D.D.C. 1994), to support his allegation that

Rosen labored under a conflict of interests because Rosen was sexually interested in the Movant's wife, Luz Borges' affidavit.[4] In this affidavit, Luz Borges states,

> After my husband fled, Rosen was calling me, asking me to go out with him, and he made numerous sexual innuendos.

[Doc. 178, Exhibits in Support of Petition for Writ of Habeas Corpus (28 USC 2255), Affidavit in Support of Conflict Motion – Luz Borges, Para. 11]. As the Movant concedes, the *Harris* case involved an actual intimate relationship. The instant case, even if true, involved no such relationship, and didn't even exist, in any event, until after the Movant had been convicted and fled; and Rosen did not even represent the Movant at his subsequent sentencing. In short, assuming *arguendo* that Rosen attempted to ask Luz Borges out, and made sexual innuendos regarding his intentions, the Movant has failed to demonstrate that Rosen's post-conviction behavior prejudiced him. As such, he failed to satisfy the requisite second prong of *Strickland*.

CONCLUSION

For the foregoing reasons, it is clear that the Movant failed to show that he received ineffective assistance, and

IT IS THEREFORE RECOMMENDED that the Movant's 28 U.S.C. § 2255 Motion to Vacate Sentence [Doc. 177] **BE DENIED.**

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[4] The Movant labeled this "Affidavit in Support of Conflict Motion-Luz Borges." This affidavit is dated July 2, 1996.

IT IS SO RECOMMENDED, this ___ day of ___, 2002.

/s/ Joel M. Feldman
JOEL M. FELDMAN
UNITED STATES
MAGISTRATE JUDGE

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT OF APPEALS

No. 01-10812-JJ

JOSE ELIGIO BORGES,
a.k.a. Papo,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA

Respondent-Appellee.

On Appeal from the United States District Court
for the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

(Opinion___, 11th Cir., 19___, ___F.2d___).

(Filed May 15, 2002)

Before: EDMONDSON, BARKETT, and MARCUS, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc

(Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

_____

UNITED STATES CIRCUIT
JUDGE

APPENDIX D

TITLE 28 U.S.C. § 2255

Section 2255, Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

APPENDIX E

U.S. CONSTITUTION: SIXTH AMENDMENT

Sixth Amendment – Rights of Accused in Criminal Prosecutions

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.